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No. 86-693

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM T. SMITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner contends that the court of appeals applied the wrong standard in determining whether his appeal presented a "substantial question of law" entitling him to bail pending appeal under Section 3143(b) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3143(b).

1. Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on one count of conspiracy, in violation of 18 U.S.C. 371, four counts of mail fraud, in violation of 18 U.S.C. 1341, and four counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3) (Pet. App. 3a). The

offenses arose out of petitioner's scheme to bribe Pennsylvania public officials in order to obtain contracts to recover Social Security (FICA) payments on behalf of state and local entities in Pennsylvania (*id.* at 2a). Petitioner was sentenced to 12 years' imprisonment and a $63,000 fine (*id.* at 3a).[1]

After his conviction, petitioner moved for bail pending appeal pursuant to Section 3143(b) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3143(b). That provision authorizes release if the district court finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" and that "the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial" (18 U.S.C. (Supp. II) 3143(b)(1) and (2)). Petitioner argued that at least one of his claims presented a "substantial question of law" under Section 3143(b)(2) entitling him to bail pending appeal. The claim that he regarded as substantial was his contention that the district court's decision to proceed with an 11-person jury under Fed. R. Crim. P. 23(b)—after one juror had been injured in an automobile accident during deliberations—was unconstitutional.[2]

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[1] The court of appeals subsequently affirmed petitioner's conviction. See 789 F.2d 196 (1986). Petitioner has filed a separate petition for certiorari (No. 86-100) seeking review of that decision.

[2] Rule 23(b) was amended in 1983 to add the following provision: "Even absent [a stipulation between the parties], if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors."

The district court granted petitioner's motion for bail pending appeal (Pet. App. 20a-21a). The court explained that it harbored "no doubt that the 11-person jury provided for in Rule 23 * * * is constitutional" (*id.* at 21a) and that "the express language of the statute would require the detention of [petitioner] pending appeal" (*id.* at 20a). Because the court felt bound by the Third Circuit's decision in *United States* v. *Miller*, 753 F.2d 19 (1985)—which held that a "substantial question" was "one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful" (*id.* at 23)—and because, at the time of petitioner's motion, there was no case law construing the constitutionality of the 1983 amendment to Rule 23(b), the court ordered petitioner released during the pendency of his appeal. Pet. App. 21a.

2. A divided court of appeals reversed the district court's release order (Pet. App. 1a-19a). Judge Mansmann, who wrote the lead opinion, explained that a question is "substantial" under *Miller* only if, in addition to being novel, without controlling precedent, or fairly doubtful, the question is "significant" (*id.* at 7a-8a). Judge Mansmann concluded (*id.* at 10a) that, in light of this Court's decision in *Williams* v. *Florida*, 399 U.S. 78 (1970), petitioner's challenge to Rule 23(b) did not amount to a significant question and that petitioner was therefore not entitled to bail pending appeal. Judge Hunter concurred in the reversal of the district court's release order (Pet. App. 11a-14a), but he did not use the *Miller* court's test in reaching that result. Rather, relying on the Eleventh Circuit's decision in *United States* v. *Giancola*, 754 F.2d 898 (1985)—which defined a substantial question as "a 'close' question or

one that very well could be decided the other way" (*id.* at 901)—Judge Hunter concluded (Pet. App. 14a) that petitioner's appeal did not present a substantial question under Section 3143(b)(2).[3]

3. Petitioner argues (Pet. 7-10) that this Court should grant certiorari to resolve a conflict among the circuits as to what constitutes a "substantial question" under Section 3143(b)(2). That issue is not presented in this case, however, because petitioner's request for bail pending appeal is now moot. When the court of appeals disposed of petitioner's appeal by affirming his conviction, the question whether petitioner was entitled to bail pending appeal ceased to remain a live issue. See *Murphy* v. *Hunt*, 455 U.S. 478 (1982).

Even if petitioner's request for bail pending appeal were not moot, this would not be an appropriate case for this Court's review. As petitioner has in effect acknowledged (Pet. 7-8), the Third Circuit's standard is more favorable to him than the standard used by the majority of circuits in reviewing requests for bail pending appeal. The majority of circuits require an appellant to show that his appeal raises "a 'close' question or one that could go either way." *United States* v. *Giancola*, 754 F.2d 898, 901 (11th Cir. 1985); see also *United States* v. *Shoffner*, 791 F.2d 586, 590 (7th Cir. 1986); *United States* v. *Pollard*,

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[3] District Judge Pollack dissented (Pet. App. 14a-19a). Employing the *Miller* test to analyze whether petitioner had presented a substantial question on appeal (*id.* at 15a), he concluded (*id.* at 19a) that the Rule 23 challenge was "fairly debatable." For that reason, he would have affirmed the district court's release order. On the appeal from petitioner's conviction, Judge Pollack joined the other two panel members in rejecting petitioner's Rule 23 challenge.

778 F.2d 1177, 1182 (6th Cir. 1985); *United States* v. *Bayko*, 774 F.2d 516, 523 (1st Cir. 1985); *United States* v. *Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (en banc); *United States* v. *Randell*, 761 F.2d 122, 125 (2d Cir. 1985), cert. denied, No. 85-710 (Dec. 2, 1985); *United States* v. *Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985); *United States* v. *Powell*, 761 F.2d 1227, 1231-1232 (8th Cir. 1985), cert. denied, No. 85-1083 (May 5, 1986). The Third and Ninth Circuits take a position that is somewhat more favorable to the appellants; in those circuits, the appellant is required only to show that his appeal raises a question that is "novel" or "fairly doubtful" (*United States* v. *Miller*, 753 F.2d 19, 23 (3d Cir. 1985)), or one that is "fairly debatable" (*United States* v. *Handy*, 761 F.2d 1279, 1285 (9th Cir. 1985); Pet. App. 9a, 15a). Although petitioner's claim was assessed under the more liberal standard applied by the Third Circuit, it was still found wanting. The claim would therefore clearly fail under the more exacting standard applied by the majority of circuits, a standard that petitioner expressly disclaims urging on the Court (Pet. 7). Accordingly, regardless of the outcome of a resolution of the different standards used to assess eligibility for bail pending appeal, it would not benefit petitioner.

4. Even if the petition for a writ of certiorari were treated as an application for bail pending certiorari, petitioner would still not be entitled to relief. Applications for bail pending certiorari are granted by this Court "only in extraordinary circumstances." *Julian* v. *United States*, 463 U.S. 1308, 1309 (1983) (Rehnquist, Circuit Justice). The applicant must demonstrate a reasonable probability that four Justices are likely to vote to grant his peti-

tion for a writ of certiorari. See *ibid.*; *Bateman* v. *Arizona*, 429 U.S. 1302, 1305 (1976) (Rehnquist, Circuit ~~Judge~~ Justice); *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, Circuit Justice). For the reasons set forth in our Brief in Opposition filed in response to petitioner's challenge to the court of appeals' decision affirming his conviction (No. 86-100), we submit that petitioner has failed to meet that exacting standard.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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